



EARTHJUSTICE

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
JUNEAU, ALASKA NEW ORLEANS, LOUISIANA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.
ENVIRONMENTAL LAW CLINIC AT UNIVERSITY OF DENVER
ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

June 10, 2003

BY FAX AND FIRST CLASS MAIL

Daniel R. Dertke
U.S. Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
Fax: (202) 616-2426

Re: *Sierra Club v. EPA*, D.C. Cir. No. 02-1135

Dear Daniel:

Last November, EPA and Sierra Club entered into a settlement agreement to resolve litigation concerning two key parts of the agency's regulatory program for hazardous air pollutants. Ex. A hereto. Pursuant to paragraph six of that settlement agreement (Ex. A at 3-4), Sierra Club hereby provides fifteen days notice that it will withdraw its consent to the order holding this case in abeyance and will move the Court to vacate that order.

One of the key elements of our settlement agreement was that EPA would propose specific language amending its "General Provisions" for regulations under § 112(d) of the Clean Air Act (known as "maximum achievable control technology" or "MACT" rules). Ex. A, Attachment. B. The agreed upon language provided for full public access to "startup, shutdown and malfunction" (SSM) plans for the sources of hazardous air pollutants that are subject to MACT rules. Specifically, it required that SSM plans (and all revisions to such plans) be submitted to the permitting authority. *Id.* Because information in the possession of a permitting authority is available to the public, the requirement set forth in the settlement agreement would have yielded full public access to all SSM plans and all revisions to SSM plans.

Another element of the settlement agreement related to the statutory deadline for "MACT hammer" permit applications under § 112(j) of the Clean Air Act, 42 U.S.C. § 7412(j). The Clean Air Act unambiguously required complete permit applications for tens of thousands of sources to be submitted no later than May 15, 2002. It further required the States in which those sources were located to issue case-by-case MACT standards for each individual source no later than November 15, 2003. As you know, EPA's 2002 rulemaking purported to extend the statutory deadline for complete hammer permit applications by two years to May 15, 2004. Had Sierra Club chosen to litigate this issue, I am confident that it could have obtained a vacatur of that unlawful extension — or indeed any extension — of the statutory deadline. I also feel confident that Sierra Club could have obtained a stay of that extension. In consideration for EPA's agreement to implement the SSM provisions set forth in the settlement agreement without

further litigation however, and in response to requests by States, industry and EPA itself, Sierra Club agreed to language that would effectively prevent the hammer from falling so long as EPA completed its overdue MACT rules according to a schedule set forth in a separate consent decree.

As EPA well knew, full public access to SSM plans was extremely important to Sierra Club and Sierra Club would never have entered into the settlement agreement without it. First, Sierra Club is committed to public access as a means by which citizens can work to protect public health and the environment in their communities. Second, by restricting access to SSM plans, EPA renders many Title V permit obligations effectively unenforceable and thus deprives the public (including Sierra Club members) of the public health and environmental benefits that Congress conferred by enacting the Clean Air Act's hazardous air pollutant provisions. Because full implementation of all of the amendments contained in the settlement agreement — including those regarding SSM plans — was crucial to Sierra Club, our settlement agreement made clear that if EPA's final rule did not contain language that was "the same in substance" as that set forth in the settlement agreement, Sierra Club could withdraw its consent to the order holding the above-referenced case in abeyance and move the Court immediately to vacate that order. It further provided that EPA may not oppose such a motion.

The SSM provisions in EPA's final rule are not "the same in substance" as those set forth in our settlement agreement. Far from requiring SSM plans and SSM plan revisions to be submitted to the relevant permitting authority, they only require such information to be submitted if a permitting authority requests it. Further, they provide that a permitting authority must request SSM plans and revisions only if a member of the public "submits a specific and reasonable request to examine or to receive a copy of that plan or portion of a plan." Thus, whereas the SSM provisions set out in the settlement agreement ensure public access to SSM plans, EPA's final rule restricts such access.

In light of EPA's failure to implement the settlement agreement's SSM provisions, Sierra Club has no choice but to exercise the remedy provided in that agreement — i.e., withdraw its consent to the order holding the above-referenced case in abeyance and move the Court immediately to vacate that order. Sierra Club hereby provides fifteen days notice that it will do so.

Sincerely,


James S. Pew

Attorney for Sierra Club

cc:

Jane Williams

Tim Backstrom

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB,

Petitioner,

v.

U. S. ENVIRONMENTAL PROTECTION
AGENCY, and CHRISTINE T. WHITMAN

Respondents.

No. 02-1135
and consolidated cases

SETTLEMENT AGREEMENT

1. This Agreement is made by and between Petitioner the Sierra Club ("Sierra Club") and Respondents the U.S. Environmental Protection Agency and Christine T. Whitman, Administrator ("EPA") in connection with the petition for judicial review of the final action entitled "National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance With Clean Air Act Sections 112(g) and 112(j)," and published at 67 Fed. Reg. 16582 (April 5, 2002), which petition is currently pending before the U.S. Court of Appeals for the District of Columbia Circuit in the above-captioned case.

2. EPA agrees that it will prepare a notice of proposed rulemaking which will propose to amend the final action which is at issue in this case. This notice of proposed rulemaking will propose to amend the regulations governing case-by-case MACT determinations under Clean Air Act Section 112(j), 40 C.F.R. §§ 63.50-56, to establish the dates listed in Attachment A as the deadline for submission of the Part 2 MACT application required by § 63.53(b) for affected

sources which are in each category or subcategory listed in Attachment A. With respect to affected sources which previously requested an applicability determination under 40 C.F.R. § 63.52(e)(2)(i), EPA will propose to require that each affected source which intends to pursue such a request resubmit and supplement its request within 60 days after EPA takes final action concerning the proposed rule required by this paragraph, or within 60 days after EPA publishes the proposed MACT standard for the category or subcategory in question, whichever is later. EPA will propose that each resubmitted request for an applicability determination must discuss the relation between the source in question and the applicability provision in the proposed MACT standard for the category or subcategory in question, and explain why a determination of applicability is necessary. EPA will also propose to require that the permitting authority act upon each resubmitted request for an applicability determination within an additional 60 days after the applicable deadline for submission of the resubmitted application. With respect to affected sources that previously obtained a case-by-case MACT determination under Clean Air Act Section 112(g), EPA will propose that any request by such a source for an equivalency determination under 40 C.F.R. § 63.52(e)(2)(ii) must be submitted by the same deadlines set forth in Attachment A, and will also be construed in the alternative as a Part 2 MACT application. The proposal will indicate that the deadlines for Part 2 MACT applications and for resubmitted requests for applicability determinations set forth in the proposed rule will not be adopted for any category or subcategory for which EPA promulgates a Federal MACT standard under Clean Air Act Section 112(d) or 112(h) before EPA takes final action under Paragraph 3 of this Agreement. The same notice of proposed rulemaking shall include a proposal to adopt the amendments to the MACT General Provisions, 40 C.F.R. Part 63, Subpart A, which are set

forth in Attachment B. EPA agrees that the EPA Administrator shall sign the notice of proposed rulemaking required by this Paragraph no later than December 3, 2002. EPA also agrees that the notice of proposed rulemaking will establish a deadline for receipt of all public comment which is 45 days after the date of publication of the notice.

3. After considering any public comments received concerning the proposed amendments addressed in Paragraph 2, the EPA Administrator will sign a notice taking final administrative action concerning the notice of proposed rulemaking no later than April 27, 2003.

4. This Agreement constitutes the sole and entire understanding of EPA and Sierra Club and no statement, promise or inducement made by any Party to this Agreement, or any agent of such Parties, that is not set forth in this Agreement shall be valid or binding. The provisions of this Agreement can be modified at any time by written mutual consent of Sierra Club and EPA.

5. After this Agreement is executed by counsel for the parties, Sierra Club and EPA agree to promptly file this Agreement with the Court, along with a new motion requesting that the Court enter an order severing this case from the other petitions with which it has been consolidated and holding this case in abeyance during the period required to effectuate the terms of this Agreement. Sierra Club and EPA agree to expressly base this new motion on their joint understanding that none of the industry petitioners or intervenors oppose such a motion.

6. If EPA fails to issue a Final Rule which includes amendments to the final action at issue in this case which are the same in substance as the amendments described in Paragraph 2, or if EPA fails to satisfy any other provision of this Agreement, Sierra Club may withdraw its consent to any order holding this case in abeyance and move the Court to immediately vacate any such order. The filing of such a motion shall constitute Sierra Club's sole remedy under this

Agreement in the event any requirement set forth in this Agreement is not met. Sierra Club agrees to give EPA fifteen (15) days notice prior to exercising its right under this paragraph. Given the circumstances of this case, the parties further agree that, if EPA fails to take any action required by Paragraph 2 or 3 of this Agreement by the specified deadline, and the parties are unable to reach agreement on a mutually acceptable extension of the deadline in question, and Sierra Club files a motion to vacate any order holding this case in abeyance after giving EPA the required notice, and the action in question has still not been taken by the time such motion to vacate is filed, then EPA will not oppose the motion to vacate. Nothing in this Agreement shall be construed to limit any right that Sierra Club may otherwise have to seek review of any final action pursuant to Section 307(b) of the Clean Air Act.

7. Except as expressly provided in this Settlement Agreement, none of the parties waives or relinquishes any legal rights, claims, or defenses it may have.

8. Nothing in the terms of this Agreement shall be construed to limit or modify the discretion accorded EPA under the Clean Air Act or by general principles of administrative law.

9. In the event that EPA issues a Final Rule which includes amendments to the final action at issue in this case which are the same in substance as the amendments described in Paragraph 2 of this Agreement, Sierra Club shall within fifteen (15) days thereafter stipulate to the dismissal with prejudice of the petition for review in the above-captioned case, in accordance with Rule 42 of the Federal Rules of Appellate Procedure.

10. EPA agrees to pay, and Sierra Club agrees to accept, the sum of \$41,584.00 in full settlement of all claims by Sierra Club for its costs of litigation (including reasonable attorney's fees and expenses) up to and including the date this Agreement is executed by the parties. Said

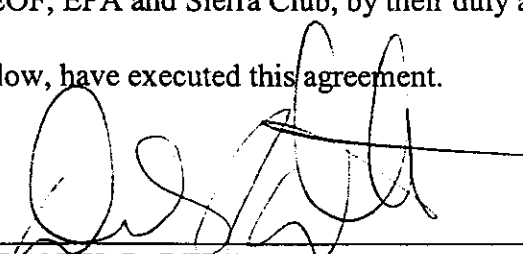
payment shall be made by electronic transfer to Earthjustice, and sent to Union Bank, Sutter Street Office, 160 Sutter Street, San Francisco, CA, 94104, Bank # 121000497, for deposit to Earthjustice Checking Account # 1010003888.

11. The commitments by EPA in this Agreement are subject to the availability of appropriated funds. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend, or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.

12. In the event that EPA fails to pay the sum specified in Paragraph 10 of this Agreement within 120 days of the date of final approval of this Agreement, Sierra Club reserves the right to petition the Court for its costs of litigation (including reasonable attorney's fees and expenses).

IN WITNESS WHEREOF, EPA and Sierra Club, by their duly authorized attorneys, whose signatures appear below, have executed this agreement.

DATE: 11-26-02



DANIEL R. DERTKE
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-0994

Counsel for EPA

DATE: 11-26-02

James S. Pew by [Signature]
JAMES S. PEW

Earthjustice

1625 Massachusetts Avenue N.W.

Suite 702

Washington, D.C. 20036

(202) 667-4500

Counsel for Sierra Club

ATTACHMENT A

Part 2 MACT Applications Required by May 15, 2003

Municipal Solid Waste Landfills

Paper & Other Webs (Surface Coating)

Flexible Polyurethane Foam Fabrication Operations

Coke Ovens: Pushing, Quenching, and Battery Stacks

Reinforced Plastic Composites Production

Semiconductor Manufacturing

Refractories Manufacturing^a

Brick and Structural Clay Products Manufacturing, and Clay Ceramics Manufacturing^b

Asphalt Roofing Manufacturing and Asphalt Processing^c

Integrated Iron and Steel Manufacturing

Hydrochloric Acid Production and Fumed Silica^d

Engine Test Facilities and Rocket Testing Facilities^c

Metal Furniture (Surface Coating)

Printing, Coating, and Dyeing of Fabrics

Wood Building Products (Surface Coating)

a Includes Chromium Refractories Production

b Two subcategories of Clay Products Manufacturing

c Two source categories

d Includes all sources within the category Hydrochloric Acid Production that burn no hazardous waste, and all sources in the category Fumed Silica.

Part 2 MACT Applications Required by October 30, 2003

Combustion Turbines

Lime Manufacturing

Site Remediation

Iron and Steel Foundries

Taconite Iron Ore Processing

Miscellaneous Organic Chemical Manufacturing (MON)^a

Organic Liquids Distribution

Primary Magnesium Refining

Metal Can (Surface Coating)

Plastic Parts and Products (Surface Coating)

Chlorine Production

Miscellaneous Metal Parts and Products (Surface Coating) (and Asphalt/Coal Tar Application - Metal Pipes)^b

^a Covers 23 source categories, listed on next page.

^b Two source categories.

Source Categories Covered by MON

Manufacture of Paints, Coatings, and
Adhesives

Alkyd Resins Production

Maleic Anhydride Copolymers Production

Polyester Resins Production

Polymerized Vinylidene Chloride
Production

Polymethyl Methacrylate Resins Production

Polyvinyl Acetate Emulsions Production

Polyvinyl Alcohol Production

Polyvinyl Butyral Production

Ammonium Sulfate
Production—Caprolactam By-Product Plants

Quaternary Ammonium Compounds
Production

Benzyltrimethylammonium Chloride
Production

Carbonyl Sulfide Production

Chelating Agents Production

Chlorinated Paraffins Production

Ethylidene Norbornene Production

Explosives Production

Hydrazine Production

OBPA/1,3-Diisocyanate Production

Photographic Chemicals Production

Phthalate Plasticizers Production

Rubber Chemicals Manufacturing

Symmetrical Tetrachloropyridine
Production

Part 2 MACT Applications Required by April 28, 2004

Industrial Boilers, Institutional/Commercial Boilers and Process Heaters^a

Plywood and Composite Wood Products

Reciprocating Internal Combustion Engines

Auto and Light-Duty Truck (Surface Coating)

^a Includes all sources in the three categories, Industrial Boilers, Institutional/Commercial Boilers, and Process Heaters that burn no hazardous waste.

Part 2 MACT Applications Required August 13, 2005

Industrial Boilers, Institutional/ Commercial Boilers, and Process Heaters^a

Hydrochloric Acid Production^b

^a Includes all sources in the three categories, Industrial Boilers, Institutional/Commercial Boilers, and Process Heaters that burn hazardous waste.

^b Includes furnaces that produce acid from hazardous waste at sources in the category Hydrochloric Acid Production.

ATTACHMENT B

All changes to the existing text to be proposed are shown in bold.

Section 63.6(e):

(1)(i) At all times, including periods of startup, shutdown, and malfunction, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions to the levels required by the relevant standards. ~~[text deleted]~~ Determination of whether **acceptable** operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures (including the startup, shutdown, and malfunction plan required in paragraph (e)(3) of this section), review of operation and maintenance records, and inspection of the source...

(3)...

(v) The owner or operator must submit to the Administrator a copy of the startup, shutdown, and malfunction plan at the time it is first adopted. The owner or operator must also submit to the Administrator a copy of any subsequent revisions of the startup, shutdown, and malfunction plan. Such revisions must be submitted at the time they are adopted if the revisions are required in order to adequately address an event involving a type of malfunction not included in the plan, or the revisions alter the scope of the activities at the source which are deemed to be a startup, shutdown, or malfunction, or otherwise modify the applicability of any emission limit, work practice requirement, or other requirement in a standard established under this part. All other revisions to the startup, shutdown, and malfunction plan may be submitted with the semiannual report required by §63.10(d)(5). The owner or operator may elect to submit the required copy of the initial startup, shutdown, and malfunction plan, and of all subsequent revisions to the plan, in an electronic format. If the owner or operator claims that any portion of a startup, shutdown, and malfunction plan, or any revision of the plan, submitted to the Administrator is confidential business information entitled to protection under section 114(c) of the Act or 40 C.F.R. § 2.301, the material which is claimed as confidential must be clearly designated in the submission. The owner or operator must maintain at the affected source a current startup, shutdown, and malfunction plan and must make the plan available upon request for inspection and copying by the Administrator...

...

(vii) Based on the results of a determination made under paragraph (e)(1)(i), the Administrator may require that an owner or operator of an affected source make changes to the startup, shutdown, and malfunction plan for that source. The Administrator **must require appropriate** revisions to a startup, shutdown, and malfunction plan, if the Administrator finds that the plan:

- (A) Does not address a startup, shutdown, or malfunction event that has occurred;
- (B) Fails to provide for the operation of the source (including associated air pollution control and monitoring equipment) during a startup, shutdown, or malfunction event in a manner consistent with safety and good air pollution control practices for minimizing emissions to the levels required by the relevant standards;
- (C) Does not provide adequate procedures for correcting

malfunctioning process and/or air pollution control and monitoring equipment as quickly as practicable; or

(D) Includes an event that does not meet the definition of startup, shutdown, or malfunction listed in § 63.2.